

Turning the Lights Off

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On 14 June the Bulgarian minister of justice (MJ) finally took the step to present to the public its long-awaited draft of the new accountability mechanism intended to ensure independent investigation for to the top three Bulgarian magistrates. The group includes the President of the Supreme Court of Cassation (SCC), the President of the Supreme Administrative Court (SAC) and the Prosecutor General (PG). The draft legislation proves that the concerns already [expressed on Verfassungsblog](#) were entirely justified.

The official aim of the new legislation is to comply with the recommendations of the EU [Cooperation and Verification Mechanism](#) (CVM) and the [case-law](#) of the ECtHR, both of which require that Bulgaria puts in place adequate safeguards for the independent investigation of the head of its soviet era prosecution office, the PG. The details of the draft legislation (DL), however, reveal their true purpose.

The Draft Legislation

First, a brief summary of what the DL envisages at this stage. The Bulgarian Supreme Judicial Council (SJC) may with a majority of 17 of its 25 members, upon proposal by the minister of justice or at least 3 of its other members, pass a resolution for opening criminal pretrial investigations against any of the top three magistrates for alleged intentional criminal offences. Together with the decision to open a pretrial investigation, the SJC orders the provisional suspension from office of the respective top magistrate. The provisional suspension from office is mandatory and it is tied to the opening of the pretrial investigation. The investigation is then conducted by mid-ranking prosecutors.

No Probable Cause Required

The first major flaw of the DL is that it authorizes the provisional suspension from office for an alleged criminal offence without a requirement to establish probable cause or to present any substantiating evidence. This is because the provisional suspension is mandatorily tied to the opening of a pretrial investigation. The threshold for the latter is just sufficient information for a reported crime. In reality, this means that the top three magistrates can be ousted from office on the basis of mere accusations.

A few preliminary remarks are needed here in order not to get lost in translation with the Bulgarian criminal procedure. The Bulgarian criminal procedure has two main phases: 1) pretrial investigation under the complete control (*dominus litis*) of the prosecutor, and 2) formal court trial. In general, the prosecutor opens pretrial investigations, if there are sufficient indicia that a reported crime has

been committed. If the prosecutor is not convinced that such crime has been committed, they conduct preliminary probe. The preliminary probe precedes the pretrial investigation and it is a rather informal procedure intended only for the purpose of gathering sufficient information to establish the necessary indicia. In the course of the preliminary probe no actual evidence is gathered, and the person accused does not have any procedural rights to refute the accusations or present counter-evidence. Thus, the threshold for opening pretrial investigations is just a convincing accusation on the basis of a preliminary probe. The opening pretrial investigation precedes the stage of indictment, where the defendant has the opportunity to present his case and submit counter-evidence. Therefore, what the DL actually does is to allow the SJC to suspend top magistrates from office on the basis of naked accusations in the absence of any evidence.

The DL also does not list the specific crimes for which it will be applicable. Therefore, the top three magistrates could be ousted on the basis of accusations of any minor offence or for some other less considerable crimes, which are neither high crimes, nor crimes related to their magistrate duties. Since the suspension from office is mandatory, any act or omission that the SJC considers worthy of opening pretrial investigation without supporting evidence will lead to suspension from office.

No Effective Remedy Provided

The DL also does not provide effective remedy against the decision of the SJC for suspension from office. Indeed, under the Bulgarian Judicial Branch Act (JBA) the decision of the SJC may be appealed before the SAC. However, the details paint a different picture.

Firstly, under the DL the suspension from office is mandatory and this means that it is not based on any independent criteria or assessment of facts. Therefore, even if appealed, the SAC is not able to strike down the decision simply because the suspension is not justified.

Secondly, the JBA provides that the decisions of the SJC are subject to mandatory “preliminary execution”. This means that they are in effect immediately and are enforceable from the date of their decree. The appeal against such a decision does not have suspensive effect. The SAC, however, has the power stay the preliminary execution. Nevertheless, the SAC has proven itself in the past to be extremely reluctant to do the latter and has imposed an extremely high threshold. This can be easily demonstrated by the telling examples of the controversial [disciplinary cases against judge Miroslava Todorova](#). The two cases took place in 2012 and 2014 and on both occasions the SAC declined to stay the preliminary execution of the SJC’s decisions. The SAC had then reasoned that in order to stay the preliminary execution severe or irreparable personal harm should be established and held that the judicial duties are of public rather than personal nature; therefore, suspension from judicial duties would do no personal harm to the judge and, consequently, no stay of preliminary execution could be granted.

The threshold for staying the preliminary execution of a provisional suspension will be even higher for the top three magistrates because their suspension from office is mandatorily tied to the opening of pretrial investigation. Thus, they will be deprived of any effective remedy.

No Recommendations Satisfied

This extraordinarily lax procedure does not satisfy the CVM and ECtHR recommendations. First, it will make it harder to start a criminal investigation against one of the top three magistrates. Presently, prosecutors are able to do that without the authorization of the SJC. Secondly, since only certain mid-ranking prosecutors are able to conduct the pretrial investigation, the independence of such investigation will not be guaranteed. This is due to the structure of the Office of Public Prosecution, where all prosecutors are directly and vertically subordinated to the authority of the PG. This mid-ranking prosecutor will have to conduct the preliminary probe prior to the decision of the SJC and still under the authority of the PG, and then conduct the pretrial investigation against his suspended former boss.

Third, the DL does not clarify who will replace the suspended head of the Supreme Courts or the Office of Public Prosecution and under what procedure. This has the potential to throw these institutions off balance which will most probably remain beheaded for the entire duration of the respective pretrial investigation.

Conclusion

These are just a few of the many major flaws of this draft legislation. Firstly, they are due to the haste of drafters. It is no secret that Bulgaria tries hard to get rid of the CVM and the accountability of the PG is the last box to be checked in that direction. If this legislation is adopted and then accepted by the EU, the CVM is expected to be terminated in respect of Bulgaria before the end of the term of the Juncker Commission, [which, of course, will be a disaster](#).

The second reason for these weaknesses is that they are deliberately put into the draft in order to achieve another purpose. None of the recommendations require the introduction of such a new mechanism for the Presidents of the Supreme Courts, but only for the PG. There is no accompanying explanatory report which would clarify the issue of packing them together.

There is also no clarity as to why exactly this arrangement allowing indefinite and complete suspension from office was picked over other more suitable ones. Alternative options would be to introduce a special recusal procedure for the PG or procedure for appointing a special prosecutor to investigate the top magistrates which would better satisfy the recommendations. Those, however, would not have allowed for the introduction of a provisional suspension of the Presidents of the Supreme Courts.

Everything, therefore, just adds to the mounting evidence for what has long been suspected. The new procedure will open the back door for the *de facto* dismissal of the most powerful independent voice of Bulgaria's judiciary, Mr. Lozan Panov, the President of the SCC, who just like the CVM refuses to go away and continues to shed light on the corruption and abuse in the judiciary.

Thus, the real purposes behind this new legislation is to do away with the CVM, keep the soviet office of the Prosecutor General unreformed, while effectively undermining judicial independence. At least somebody in Europe will be able to have his cake and eat it.

